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RULES OF THE DISTRICT COURT, DISTRICT OF COLORADO,
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IN THE

Supreme Court of the United States

No. .....

EARLE F. WINGREN, Trustee in Bankruptcy of The Mutual Investment and Security Company, Bankrupt,
Petitioner and Appellee Below,

vs.

MINNIE C. HANSSEN, THYRA H. MANKIN BERGER, W. J. O'NEILL, J. F. McGRAW, CATHERINE J. HANNA, P. B. McATEE, MAY WALSHE, FRANCES E. JOHNSTON, E. F. MITCHELL, KATE A. MITCHELL, MARGARET SWINK, LAURA E. PARKER and ALBERT J. GOULD,
Respondents and Appellants Below.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner seeks a review of a final judgment of the Circuit Court of Appeals for the Tenth Circuit wherein the court refused, in a bankruptcy proceeding which followed the failure of a confirmed but only partially consummated plan of reorganization initiated under Section 77B but adjudicated under Chapter X, Article XII, of the Chandler Act, to apply the provisions of either Act relating to classi-

fication of claims. The controversy appealed was between the trustee (petitioner) and respondents involving certain claims which had been filed by respondents as secured claims based on the order confirming the plan of reorganization, and which had been denied security by the referee in the bankruptcy proceeding, but allowed as general claims. The Circuit Court, in anticipation of questions not before it, refused to determine the questions presented on the appeal, and, on a record in which no issue had been formulated with respect to any equities between different classes of creditors, and though the subordinated creditors had no opportunity to be heard, nevertheless subordinated the claims of certain creditors to respondents on equitable considerations which the court believed to have grown out of the prior reorganization proceedings.

The practical and inequitable effect of the decision is to penalize other creditors by giving to respondents a priority in payment (without defining its nature or basis) more extensive in its application to the assets of the bankrupt than respondents ever claimed to have on any theory of the case, in that it extends the priority to personal as well as real property, whereas the priority claimed by respondents under the reorganization plan was limited to real property.

STATEMENT OF FACTS

The bankrupt and a subsidiary (which is not concerned in or in any manner affected by this matter) filed a joint petition in reorganization on December 13, 1935. The bankrupt was in the general real estate investment business and as a part thereof borrowed and loaned money and conducted real estate loan, sales, and insurance departments (R. 3-11). Such petition was approved as properly filed (R. 11-13) and a Referee and Special Master was appointed (R. 14-15). Thereafter, such proceedings were had before the Referee and Court as resulted in the filing of an amended plan of reorganization (pamphlet pp. 1-12, shown in the record at p. 17), which provided for the payment of certain specified secured claims, taxes and expenses of administration, and classified the unsecured creditors into two groups described in Sections VIII and IX, such classifica-

tion being subject to later determination by the court of rank, disallowance of claims, further audit, and offsets (pamphlet pp. 5-7). All proposals contained in the amended plan were subject to such orders of reclamation and orders relating to foreclosure and/or sale as might be made by court or judge (pamphlet p. 7).

The amended plan was in due course accepted by the necessary number and amount of creditors; thereafter an amendment dated November 23, 1936 (R. 18-21) was proposed by the bankrupt (then debtor) modifying in certain respects Sections VIII and IX, which was approved by the court as a modification of the amended plan not materially adverse to the interests of any creditor or stockholder; and on April 2, 1937, the amended plan dated August 1, 1936, as thus modified was confirmed by the court (R. 21-26). Certain pertinent reservations were contained in the order of confirmation including the right to order the estate liquidated for failure to consummate the plan (R. 25).

Claims were filed with the referee and special master pursuant to law and the orders of court, among them the claims of respondents (R. 45-49).

On April 17, 1939, after notice to creditors and others interested pursuant to Chapter X, Article XI, Sections 222 and 223 of the Chandler Act, as required by the order of the Court, a further amendment granted an additional six months for consummation (R. 26-29). In the meantime, $8,775.75 principal and $2,717.27 interest, as provided by the plan, had been paid to the creditors whose claims totalling $35,275.83 had been classified in Section VIII, and other payments had been made to creditors holding liens, to discharge tax liens, and for costs of administration and expenses of continued operation of the business, all as provided by the plan and authorized by the court (R. 30-32).

On October 6, 1939, the bankrupt (then debtor) and its trustee filed a Report and Petition for Entry of Order of

Adjudication Pursuant to Chapter X, Article XII of the Bankruptcy Act (R. 29-34). Notice to show cause thereon was given pursuant to appropriate order of court, the pertinent part of such notice being as follows:

> "It is ordered: That the debtor, stockholders and creditors of The Mutual Investment and Security Company, as well as all other parties in interest, show cause at a hearing to be had on such petition before the District Court of the United States for the District of Colorado, at Denver, in said district, on the 25th day of October, 1939, at ten o'clock A.M. or as soon thereafter as such hearing may be had, why an order adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of Article XII, Chapter X, of the Bankruptcy Act, should not be entered.
>
> "That notice of such hearing be given by mailing a copy of this order at least ten days prior to the date set for such hearing to each of the stockholders, creditors, and parties in interest entitled to notice of proceedings herein, and by publishing a copy thereof in The Daily Journal, at least once, more than ten days prior to the date set for such hearing" (R. 35).

After some continuances, the order of adjudication in bankruptcy was entered on December 12, 1939 (R. 36), no appeal was taken, and subsequently petitioner was duly appointed as trustee in bankruptcy of the bankrupt corporation.

On February 6, 1940, new secured claims were filed by respondents in the office of the referee to whom the matter had been previously referred. All such claims were identical except as to names and amounts, and were substantially as follows:

> "At Denver, in the State of Colorado, came Catherine J. Hanna, whose address is c/o A. J. Gould,

Midland Savings Building, in Denver County, State of Colorado, District of Colorado, and made oath and says that The Mutual Investment and Security Company, the corporation for which a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said deponent in the sum of Sixteen Hundred Four Dollars and twenty-seven cents; plus interest at the rate of 4% per annum subsequent to April 2, 1939;

"That the consideration of said debt is as follows:

"This proceeding was instituted on the 13th day of December, 1935, by the filing herein, with the approval by this Honorable Court, of a petition of the debtor to be reorganized pursuant to the provisions of Section 77B of the Bankruptcy Statutes of the United States; that thereafter, and on the 12th day of August, 1936, the debtor filed herein an 'Amended Plan of Reorganization' and on the 7th day of December, 1936, the debtor filed a 'Proposed Amendment' to said 'Amended Plan of Reorganization'.

"That on or about the 2nd day of April, 1937, this Honorable Court, following proper notice to all interested persons, entered an order confirming said 'Amended Plan of Reorganization' as amended on December 7, 1936, by said 'proposed Amendment'.

"That by virtue of the provisions of said Section 77B, said 'Order of Confirmation' became a judgment of this court and all rights, liens and priorities of all of the debtor's creditors herein were finally determined and established thereby; that a certified copy of said 'Order of Confirmation' thereupon was recorded in the recorder's office of the City and County of Denver, Colorado.

"That by the terms of said 'Order of Confirmation'

and the provisions of the amended 'Amended Plan of Reorganization' this deponent was granted a general lien (with others described in Paragraph VIII of said 'Amended Plan') upon all of the debtor's interest in all of the real property of the debtor for the sum of $2139.03 which was therein determined to be due deponent with interest thereon at 4% per annum.

"That the trustee appointed by said 'Order of Confirmation' for the purpose of assisting in the execution of said plan and pursuant thereto, has paid deponent the sum of $534.76 on account of said principal amount and has paid interest thereon to deponent to April 2, 1939.

"That the sum of $1604.27 with interest thereon at 4% per annum subsequent to April 2, 1939, remains unpaid to deponent and is secured as hereinabove alleged.

"That said 'Amended Plan of Reorganization,' said 'Proposed Amendment' and said 'Order of Confirmation' are a part of the files in this proceeding and reference thereto is hereby made for greater certainty.

* * * *

"That no part of said debt has been paid nor are there any setoffs or counterclaims to the same except as appear from and upon the said exhibit . . . hereto attached; and that no note has been received for said debt and no judgment rendered thereon except as herein stated.

"That deponent has not, nor has any person by his order or to his knowledge or belief; for his use, had or received any manner of security for said debt whatever, except (describe fully).

* * * * *

"That said claim is not a preferred claim except for $....." (R. 62-64.)

Objections were filed by the trustee to each of such claims, substantially as follows:

"Comes now Earle F. Wingren, trustee duly appointed, qualified, and acting of the above named bankruptcy estate, and objects to the allowance of the claim of Catherine J. Hanna, numbered 60B, heretofore filed herein, as follows:

"Denies that the said claim is a secured claim, and alleges that the same is a general claim, and should be allowed and classified for payment in accordance with Section 64 of the Bankruptcy Act.

"Denies that by virtue of the provisions of Section 77B, the 'Order of Confirmation' entered in proceedings No. 8729 for the reorganization of corporations was a judgment and denies that all rights, liens, and priorities of all of the debtor's (the bankrupt's) creditors herein were finally determined and established thereby.

"Alleges that pursuant to the provisions of Section 77B (k) of the Bankruptcy Act, and to the provisions of Article XII of Chapter X of the so-called Chandler Act, said claim should be allowed and classified for payment in accordance with Section 64 of the Bankruptcy Act." (R. 61-62.)

No testimony was taken (R. 64); after hearing and argument the referee and special master handed down his findings and decision denying the claims of appellants as secured claims (R. 44-59). Petitions for review were filed (R. 59-60), and the record on review (R. 41-43) certified to the judge according to the praecipes filed by the parties pursuant to local rule of the District Court (R. 157).

Hearing was had before the District Court on the question certified which was as follows:

"Bankruptcy was preceded by a proceeding to reorganize under 77B. A plan was filed and confirmed. Subsequently the debtor was adjudicated a bankrupt. Claimants under reorganization claim the order confirming the plan was an adjudication of a priority in their favor which must be recognized in the bankruptcy proceeding instead of Section 64 of the Bankruptcy Act.

"Is the order of confirmation a final judgment establishing creditors' rights to distribution in bankruptcy even though in conflict with Section 64?" (R. 44.)

and the order of the referee confirmed (R. 64-65).

Thereafter notice of appeal was filed (R. 65); subsequently respondents (then appellants) filed a designation of contents of record on appeal (R. 66-67), which included items which had not been considered or noticed by either the referee or district judge, and none of which had been requested of or certified by the referee on petition for review (R. 41-43). Motion was filed by the trustee to submit the record on appeal to the District Court (R. 69) and after argument order was entered by the court excluding the items objected to (R. 71). No appeal was taken from such order, but thereafter respondents perfected their appeal to the Circuit Court of Appeals for the Tenth Circuit from the other order of the District Court confirming the referee on the main question.

No preliminary hearing was applied for in the Circuit Court with respect to the extent of the record or otherwise pursuant to District Court Rule 75 (j), and no certiorari for diminution of the record was applied for pursuant to Rule 13 of the Rules of the Tenth Circuit. The designation of points to be relied upon required by Rule 13 made no reference to the order of the district judge whereby the desired documents were excluded from the record (R. 1-2). Appellants in their first brief "suggested" a diminution of the record (R. 79), and attached to such

brief as an appendix the five documents expressly excluded from the record by the district judge (R. 117-129).

In due course the cause appealed was argued and submitted.

The Circuit Court of Appeals thereafter filed its opinion, holding that it was unnecessary to determine the questions raised by the parties and decided by the referee and district judge with respect to the nature and effect of the order of confirmation, and the necessarily related questions as to whether the confirmed plan was a contract, and if it was, whether it might be impaired by exercise of the bankruptcy power; whether respondents had any lien or priority, when and how it arose, and whether it was subject to the implied condition that the bankruptcy law might be changed; what effect Section 77B (k) and Chapter X, Article XII, Sections 236 and 238 had on the priority of debts; whether Section 77B (g) provided that a plan once confirmed, even though not consummated, should be binding on questions of classification of creditors; whether respondents had any vested rights of any kind, and other incidental questions. Instead, the court decided, citing *Pepper* vs. *Litton*, 308 U. S. 295, 84 L. Ed. 281, and *Taylor* vs. *Standard Gas & Elec Co.*, 306 U. S. 307, 83 L. Ed. 669, that "equitable considerations" required the claims of creditors of the class included in Section IX to be subordinated.

Thereafter, the Circuit Court entered its judgment, reversing the judgment of the District Court and remanding the cause for further proceedings consistent with the opinion of the court, and granting costs to respondents. Petitioner filed a petition for rehearing in said cause (R. 207-209), together with a brief in support thereof (R. 210-218), which petition was subsequently denied.

II.

JURISDICTION

The date of the judgment to be reviewed is July 19, 1941

(R. 204); rehearing was denied on August 25, 1941 (R. 219).

The statutory provision which is believed to sustain the jurisdiction of this court is the act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938, being Section 240 of the Judicial Code, as amended (28 U. S. C. A. 347) wherein it is provided that it shall be competent for the Supreme Court of the United States to review by certiorari a judgment of a Circuit Court of Appeals.

The nature of the case as disclosed from the summary statement and statement of facts hereinabove; the rulings of the court with respect to important questions of federal bankruptcy law, and the departure from the accepted and usual course of judicial proceedings are believed sufficient to warrant the exercise of judicial discretion by this court pursuant to the provisions of Rule 38 (5) of the rules of the United States Supreme Court.

Cases believed to sustain the jurisdiction are cited below with the reasons relied upon for granting the writ.

III.

QUESTIONS PRESENTED

The questions and propositions of law involved in this case are substantially as follows:

1. Can an appellate court depart from the issues and change a proceeding to consider the allowance of secured claims to a proceeding to adjust equities on order of distribution, especially where no issues have been formed and no evidence taken between respondents and other creditors, and it is by no means certain that all the evidence which other creditors might produce is in the record?

2. Does a bankruptcy court have the power to create a priority in payment not granted by statute upon any considerations of equity which may appeal to it in a particular case?

3. Does a bankruptcy court have the power to rest a decision in a particular case on general principles of equity applicable in bankruptcy proceedings if the exercise of such power amounts to a denial of applicable statutory provisions; i. e., Section 77B (k) (11 U.S.C.A. 207) and Chapter X, Article XII, Section 238 (11 U.S.C.A. 638), whereby Section 64 (11 U.S.C.A. 104) is made mandatory?

4. If a bankruptcy court has such power, did the facts and circumstances of the present case warrant its exercise to the extent that the result was to give to one group of creditors a priority in payment more extensive in its application to the assets of the bankrupt than such creditors could have enjoyed under the prior reorganization plan upon which they based their right, and greater than they have at any time contended for?

5. In a case where the respondents were before the court in a controversy with the trustee in bankruptcy involving the existence of a lien arising from the terms of a preceding confirmed but not fully consummated plan of reorganization and the court refuses to determine whether such lien exists, do any equitable considerations require or permit, in the decision of such controversy, the subordination to respondents' claims of the claims of other creditors, where the record is devoid of evidence of any legal relations between the two groups of creditors, or of any control over or activity in the affairs of the bankrupt, or of the reorganization proceedings, except that the required number of each group of creditors agreed to the plan of reorganization proposed by the company, and where the record is also devoid of any evidence of fraud, conduct involving moral turpitude, intention to deceive, or neglect or breach of duty on the part of such subordinated creditors, or any of them?

6. In a case where the claims of respondents, together with those of other creditors, were classified for payment under Section VIII of the plan of reorganization later con-

firmed, and such creditors were paid twenty-five per cent of their claims plus interest pursuant to such plan, where subsequently the plan failed, an order of adjudication was entered pursuant to Chapter X, Article XII (11 U.S.C.A. 636), of the Bankruptcy Act, and respondents thereafter within the period provided by Section 238 (11 U.S.C.A. 638) filed new secured claims for the balances owing to them based upon the terms of the confirmed but not consummated plan, without amendment of or reference to their original claims, have they elected to abandon the theory of their original claims and to rely only upon the new secured claims voluntarily filed by them?

7. Did respondents have any vested rights under the bankruptcy act or otherwise, either as preferred or lien creditors, prior to the order of confirmation?

8. If respondents had no vested rights prior to the order of confirmation, did their assertion that a trust relationship existed, taken together with the fact that the required two-thirds of each group of creditors consented to the plan, warrant the circuit court in the exercise of equitable powers, in giving respondents any priority on distribution of assets over the claims of simple contract creditors?

9. Did respondents acquire any vested rights of lien or otherwise, by virtue of the plan, the confirmed plan, or the order of confirmation, either as a contract or as a judgment; or did any such rights vest by express statute upon entry of the order of confirmation?

10. What is the nature and effect of the order of confirmation under Section 77B (f), (g), and (h) (11 U.S.C.A. 207)?

11. What is the nature and effect on the rights of creditors, of this plan of reorganization confirmed under Section 77B (11 U.S.C.A. 207)?

12. Where a petition asking for adjudication pursuant

to the provisions of Chapter X, Article XII (11 U.S.C.A. 636), of the Chandler Act is filed by the debtor, notices are sent to all interested persons pursuant to Section 236 (2) to show cause why the petition should not be granted, no cause is shown, the adjudication order is entered on the petition, and no appeal from that order taken, does the Chandler Act apply to the pending proceeding, is its application res adjudicata, and is the application of the particular provisions of Article XII to the subsequent conduct of the proceeding mandatory?

13. If the Chandler Act does apply to this proceeding, what is the meaning and effect of Chapter X, Article XI, Sections 222, 223, 224 and 228 (11 U.S.C.A. 622-4, 628), in so far as they relate to the revocation or modification of an order of confirmation entered under Section 77B; and of Chapter X, Article XII, Sections 236 and 238 (11 U.S.C.A. 636, 638), in so far as they relate to the rights of persons whose claims as creditors were classified for the purposes of a plan of reorganization initiated under Section 77B?

14. Does usual and accepted judicial practice permit the enlargement of a record on appeal to the Circuit Court by inclusion therein by appendix to appellants' brief (R. 117-127) of material not noticed or considered by the Referee or District Judge, consisting of five separate documents, four of which (R. 117-122) were never made a part of the files in the District Court either by certification to the court of the record on review by the Referee, or otherwise?

15. Does Rule 75(h) of the Rules of Civil Procedure for the District Courts permit the District Court on proper submission of the record to it, to exclude from the record on appeal material not noticed or considered either by Referee or Judge?

16. Does the Circuit Court of Appeals have the right under Rule 75(h) of the Rules of Civil Procedure, on sug-

gestion for the first time made in appellants' brief, or on its own initiative, to consider as a part of the record on appeal material expressly ordered (R. 69) to be excluded from that record by the District Court after hearing under Rule 75 (h), but thereafter appended to appellants' brief as an appendix, where there has been no previous application to the Circuit Court for an intermediate order or for certiorari under Rule 13 of the Rules of the Tenth Circuit, and where there has been no appeal from the order of the District Court excluding such material from the record?

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

The reasons relied on for the allowance of the writ are as follows:

1. The novelty of the questions presented and the great importance of the provisions of the reorganization sections of the Bankruptcy Act to the business world and to the legal profession, as well as to the courts charged with the administration of the Bankruptcy Act, require an authoritative and elucidating decision, particularly as to those sections which relate to the nature and effect of orders of confirmation of plans of reorganization, and the status and rights of creditors in the case of confirmed plans only partially consummated and followed by bankruptcy or liquidation. In the following cases certiorari has been granted because of the importance of the questions involved.

Palmer v. *Conn. Ry & L. Co.*, dec. Jan. 6, 1941, 85 L. Ed. Adv. Op. No. 5, p. 283.

Wright v. *Union Cent. L. I. Co.*, dec. Dec. 9, 1940, 85 L. Ed. Adv. Op. No. 3, p. 166.

Cons. Rock Prod. Co. v. *DuBois*, dec. Mar. 3, 1941, 85 L. Ed. Adv. Op. No. 9, p. 603.

Sampsell v. *Imperial Paper & C. Corp.*, dec. Apr. 28, 1941, 85 L. Ed. Adv. Op. No. 13, p. 797.

Palmer v. *Webster & Atlas Nat. Bank*, dec. Feb. 3, 1941, 85 L. Ed. Adv. Op. No. 7, p. 436.

Woods v. *City Nat. B. & T. Co.*, dec. Feb. 3, 1941, 85 L. Ed. Adv. Op. No. 7, p. 478.

Palmer v. *Massachusetts*, 308 U. S. 79, 84 L. Ed. 93.

Hancock Mutual Life Ins. Co. v. *Bartels*, 308 U. S. 180, 84 L. Ed. 176.

Carpenter v. *Wabash Ry. Co.*, 309 U. S. 23, 84 L. Ed. 558.

Thompson v. *Magnolia Pet. Co.*, 309 U. S. 478, 84 L. Ed. 876.

Union Joint Stock Land Bank v. *Byerly*, 310 U. S. 1, 84 L. Ed. 1041.

Sec. & Exch. Com. v. *U. S. R. & Impt. Co.*, 310 U. S. 434, 84 L. Ed. 1293.

In *Carpenter* v. *Wabash*, 309 U. S. 23, 84 L. Ed. 558, certiorari was granted in view of the importance of an amendment relating to the priority of certain claims.

2. The questions of federal law with respect to the status and rights of creditors in a bankruptcy proceeding following the failure of a partially consummated plan of reorganization have not been, but should be, settled by this court. In the following case certiorari was granted to decide a bankruptcy question not previously settled by the Supreme Court.

Fisher v. *Pauline O. & Gas. Co.*, 309 U. S. 294, 84 L. Ed. 764.

3. The decision of the said Circuit Court of Appeals in expressly refusing to apply to respondents' claims the provisions of the amendatory act (Chapter X, Article XII, Secs. 236 and 238, 11 U. S. C. A. 636, 638) is an erroneous decision of an important question of bankruptcy law, and is in conflict with a decision of the Circuit Court for the Third Circuit, i. e., *In re Columbia Ribbon Co.*, 117 Fed. (2d) 999, wherein the precise point was decided, and is in substantial conflict with a decision of the Circuit Court for

the Second Circuit; i. e., *In re Carden*, 118 Fed. (2d) 677, wherein an amendatory provision of the Chandler Act was found to be mandatory, and applied to the exclusion of equitable considerations. In the following case certiorari has been granted where such a conflict existed.

Thompson v. *Magnolia Pet. Co.*, 309 U. S. 478, 84 L. Ed. 876.

4. The decision of the Circuit Court of Appeals was based on the supposed authority of the decisions of the court in *Pepper* v. *Litton*, 308 U. S. 295, 84 L. Ed. 281, and *Taylor* v. *Standard Gas & Elec. Co.*, 306 U. S. 307, 83 L. Ed. 669, but the questions presented by and involved in the case of petitioner were not, as petitioner believes, presented by or involved in either *Pepper* v. *Litton* or *Taylor* v. *Standard Gas & Elec. Co.*, and the said questions raised here were not decided in either of those cases, nor were the same necessary for the determination of either of those cases. Rule 38, 5 (b), Revised Rules of the United States Supreme Court.

5. The decision of the Circuit Court of Appeals as to the application of "equitable considerations" and its refusal to consider the pertinent statutory provisions is the decision of questions of federal law in conflict with principles established by applicable decisions of this court wherein limitations on the exercise of equitable powers have been consistently recognized, as in *Sec. & Exch. Com.* v. *U. S. R. & Imp. Co.*, 310 U. S. 434, 84 L. Ed. 1293, 1303, and cases therein cited, and in *U. S. Rubber Co.* v. *American Oak L. Co.*, 181 U. S. 434, 45 L. Ed. 938. In the following case certiorari was granted because of such conflict:

Ansaldo San Giorgio v. *Rheinstrom Bros.*, 294 U. S. 494, 79 L. Ed. 1016, 1019.

6. The decision of the Circuit Court in refusing to determine the legal effect of the order of confirmation and of the confirmed plan, is in conflict with principles established by this court in *Meyer* v. *Kenmore Granville Hotel Co.*, 297 U. S. 160, 80 L. Ed. 557, wherein the nature of an order confirming a plan was settled. The Tenth Circuit has

heretofore recognized such case as authority in *In re Deep Rock Oil Corp.*, 113 Fed. (2d) 266, 269, with specific reference to the possibility of modification of a confirmed plan.

Ansaldo San Giorgio v. *Rheinstrom Bros.*, supra.

7. The decision of the said Circuit Corut of Appeals, in holding that equitable considerations govern the instant case, although the record contains no facts tending to support such application, so far departs from the accepted and usual course of judicial determination as to call for the exercise of the supervisory powers of the Supreme Court in bankruptcy matters. Rule 38 (b), Revised Rules of the United States Supreme Court.

8. The decision of the Circuit Court of Appeals in holding that the claims of the Section IX creditors be subordinated, amounts to a finding of fact that the subordinated creditors were guilty of some inequitable conduct, without any evidence to support such finding, was erroneous as a matter of law, and hence within the scope of review of this court.

Lawson v. *U. S. Min. Co.*, 207 U. S. 1, 52 L. Ed. 65, 74.

Chicago, Milw. & S. P. Ry. v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041, 1044.

Panama Mail Ss. Co. v. *Vargas*, 281 U. S. 670, 74 L. Ed. 1105.

9. The importance of the procedural problem in administration of the Bankruptcy Act. The decision of the Circuit Court of Appeals, in ignoring the questions raised by the parties as to enlargement of the record on appeal after it had reached the Circuit Court of Appeals (by means of appending material not considered by the referee or district judge as an appendix to appellants' first brief) tacitly approves irregularities in practice which so far depart from the accepted and usual course of judicial proceedings with respect to records on review and appeal as to require the determination by this court of the propriety of such practice, and an authoritative decision as to the powers of both

the District Courts and the Circuit Courts under Rule 75, and especially the power of the District Court to make a record conform to the truth under paragraph (h) of such Rules.

Reconstruction Finance Corp v. *Prudence Sec. Adv. Group*, dec. Jan. 6, 1941, 85 L. Ed. Adv. Op. No. 5, p. 300.

Duke Power Co. v. *Greenwood*, 299 U. S. 259, 81 L. Ed. 179.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 2245, Minnie C. Hanssen, et al., Appellants, vs. Earle F. Wingren, Trustee in Bankruptcy of The Mutual Investment and Security Company, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States and the Rules of this court; and that the judgment of said Circuit Court be reversed by the court, and for such further relief as to this court may seem proper.

Dated at Denver, Colorado, September 30, 1941.

EARLE F. WINGREN, Trustee in Bankruptcy of The Mutual Investment and Security Company,

Petitioner,

By NORMA L. COMSTOCK,

Counsel for Petitioner.